

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA,

Plaintiff,

v.

HUDSON SAND AND GRAVEL, INC.;
BALLINGER PROPERTIES, L.L.C.;
FIVE-N-ASSOCIATES, LTD.; and TANA
PROPERTIES, LTD.

Defendants.

CIVIL ACTION NO.

COMPLAINT

Plaintiff, the United States of America ("United States"), by authority of the Attorney General of the United States and on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), alleges as follows:

1. This is a civil action brought pursuant to sections 309(b) and 309(d) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1319(b) and 1319(d). The United States seeks civil penalties and injunctive relief for violations of sections 301 and 308 of the Act, 33 U.S.C. §§ 1311 and 1318, and implementing regulations. The violations consist of numerous, unpermitted discharges of storm water into waters of the United States; the failure to apply for a permit for such discharges; the failure to adequately respond to information requests; and discharging dredged and/or filled materials into waters of the United States, all in connection with a sand and gravel mining operation on an approximately 300 acre undeveloped parcel on land in Londonderry, New Hampshire ("Facility").

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b), and pursuant to 28 U.S.C. §§ 1331, 1345, and 1355.

3. Venue is proper in this district pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b), and pursuant to 28 U.S.C. § 1391(b) and (c), and 28 U.S.C. § 1395.

4. Notice of the commencement of this action was given to the State of New Hampshire, pursuant to section 309(b) of the CWA, 33 U.S.C. § 1319(b), on January 23, 2007.

5. Authority to bring a civil action is vested in the Attorney General of the United States pursuant to section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

THE PARTIES

6. The Plaintiff in this action is the United States of America.

7. Defendant Hudson Sand and Gravel, Inc. ("HSG") is a domestic for-profit corporation incorporated under the laws of the State of New Hampshire.

8. Defendant Ballinger Properties, L.L.C. ("Ballinger") is a domestic for-profit limited liability company organized under the laws of the State of New Hampshire, and maintains offices in Nashua, New Hampshire.

9. Defendant Five-N-Associates, Ltd. ("Five-N") is a general partnership with offices in Nashua, New Hampshire registered under the laws of State of New Hampshire.

10. Defendants Ballinger and Five-N jointly own nine (9) land parcels that encompass approximately 221 acres of land within the Facility. The 221 acres jointly owned by Defendants Ballinger and Five-N are represented on the Town of Londonderry Tax Assessment Map at

parcels 14-45-0; 14-45-2; 14-46-0; 28-17-0; 28-17-3; 28-17-4; 28-18-3; 28-18-5; and 28-18-7.

11. Defendant TANA Properties, Ltd. ("TANA") is a limited partnership registered under the laws of the State of New Hampshire, and maintains offices in Nashua, New Hampshire.

12. Defendant TANA owns three (3) parcels of land totaling approximately 80 acres within the Facility. The three land parcels owned by Defendant TANA are represented on the Town of Londonderry Tax Assessment Map at parcels 14-34-0; 14-35-0; and 14-36-0.

13. At all times relevant to this Complaint, HSG was the broker of sand and gravel at the Facility. HSG entered into contracts with various excavators at the Facility pursuant to rights granted by the property owner Defendants, Ballinger, Five-N, and TANA. HSG, Ballinger, Five-N, and TANA had control over the plans and specifications for the excavation activities at the Facility. Ballinger, Five-N, and TANA had control over the permitting of activities at the Facility. At all times relevant to this Complaint, HSG, Ballinger, Five-N, and TANA were operators of the Facility.

14. HSG, Ballinger, Five-N and TANA (collectively referred to as "Defendants") are each a person within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

SITE DESCRIPTION

15. The Facility encompasses approximately 300 acres of property located adjacent to and directly south of the Manchester Airport. The Facility includes, but may not be limited to, the following land parcels (as represented by the Town of Londonderry Tax Assessment Maps): 14-34-0; 14-35-0; 14-36-0; 14-45-0; 14-45-2; 14-46-0; 28-17-0; 28-17-3; 28-18-3; 28-17-4; 28-18-5; and 28-18-7.

16. The Facility is in area zoned for industrial use and has been operated for sand and gravel mining since at least 1989. There are few visible landmarks at the Facility and it contains numerous stockpiles of sand and cobbles, which often are located in close proximity to surface waters that traverse the parcel.

17. The Facility is located in the Merrimac River watershed, where the Merrimac River forms the western boundary of the watershed. Little Cohas Tributary and Horse Trail Brook are the primary surface waters that run through the Facility. Little Cohas Tributary flows into Little Cohas Brook, which flows to the Merrimac River. Horse Trail Brook flows directly into the Merrimac River.

18. Two surface waters flow east to west through the Facility: (1) the Little Cohas Tributary flows from a wetlands area on the northern portion of the Facility to the Merrimac River via the Little Cohas Brook (the "Little Cohas Tributary" or "Tributary"); and (2) the Horse Trail Brook flows through the southern portion of the Facility directly into the Merrimac River.

19. There are also riparian zones and numerous wetlands located throughout the Facility, which form wildlife corridors connecting the Merrimac River to wetlands areas to the east of the Facility.

20. Two established roads are located on and intersect the Facility: (1) Pettingill Road runs east to west across the northern portion of the parcel; and (2) Industrial Drive Extension runs from the most northeastern portion of the parcel and intersects with Pettingill Road. In addition, several haul roads exist on the Facility.

SITE INVESTIGATION AND BACKGROUND

21. In 2003, EPA sent three information requests to HSG and Peter-Sam Investment Properties, a former owner of certain parcels of the Facility who had been identified as the owner of the Facility.

22. The responses received from HSG and Peter-Sam Investment Properties were confusing, non-responsive and inadequate.

23. EPA performed five NPDES Compliance Evaluation Inspections ("CEIs") at the Facility between September 2002 and May 2005. Specifically, inspections at the Facility occurred on September 26, 2002; April 14, 2003; August 12, 2003; May 5 and 6, 2004; and May 26, 2005.

24. On May 4, 2004, defendant HSG denied access to the EPA inspector, and EPA obtained a warrant in the District Court of New Hampshire to perform the May 5-6, 2004 site inspection.

25. The inspections at the Facility identified evidence of point source discharges of storm water and deficient or nonexistent best management practices ("BMPs") to control discharges of storm water.

26. During the September 26, 2002 inspection, EPA observed evidence of point source discharges of storm water into the Little Cohas Tributary at the Industrial Drive extension culvert area (hereinafter referred to as "PSD #1"). Evidence of point source discharges of storm water from the PSD #1 area were also observed by EPA in both the April and August 2003 inspections, the May 2004 inspections, and the May 26, 2005 inspection.

27. During the September 26, 2002 inspection, EPA observed evidence of point

source discharges of storm water into the Little Cohas Tributary at the Pettingill Road culvert area (hereinafter referred to as "PSD #2"). Evidence of point source discharges of storm water from the PSD #2 area were also observed by EPA in both the April and August 2003 inspections, as well as the May 2004 inspections.

28. During the April 14, 2003 inspection, EPA observed evidence of point source discharges of storm water into the Little Cohas Tributary at the intersection of Pettingill Road and the haul road leading to the southern portion of the Facility (hereinafter referred to as "PSD #3"). Evidence of point source discharges of storm water from PSD #3 were also observed during the August 2003 inspection.

29. During the May 2004 and May 2005 inspections, EPA observed a point source discharge of storm water into the Little Cohas Tributary. This point source discharge is located to the north of Pettingill Road and to the west of the Industrial Drive Extension, and is approximately 1,259 linear feet upstream of the confluence of the Tributary and Little Cohas Brook (hereinafter referred to as "PSD #4").

30. During the May 2004 and May 2005 inspections, EPA observed a point source discharge of storm water into the Little Cohas Tributary. This point source discharge is located to the north of Pettingill Road and to the west of the Industrial Drive Extension, and is approximately 633 linear feet upstream of the confluence of the Tributary and Little Cohas Brook (hereinafter referred to as "PSD #5").

31. Defendants Ballinger and Five-N jointly own the land containing PSD # 1, PSD #2, PSD #3, PSD #4 and PSD #5.

32. During the September 26, 2002 inspection, EPA observed evidence of a point

source discharge of storm water into the Horse Trail Brook on the northern bank of the Horse Trail Brook as the Brook curves to the east (hereinafter referred to as "PSD #6"). Defendant TANA owns the land containing PSD #6.

33. During the May 26, 2005 inspection, EPA observed a large quantity of rock and a concrete manhole placed in a 200-foot portion of the Little Cohas Tributary. EPA also observed rock placed in the Tributary at either end of a culvert located under Industrial Drive Extension that contains the Tributary. EPA later uncovered evidence of the discharge of dredged and/or filled material associated with the installation of an underground perforated drainage pipe in the Tributary; and dredged and/or filled material associated with the channelization and the installation of a manhole in wetlands forming the headwaters of the Tributary.

34. During its inspections, EPA observed large amounts of solids in various places in the Tributary. During the May 2004 inspections, EPA observed solids discharging from the Tributary into Little Cohas Brook at the confluence of the Tributary and Little Cohas Brook.

STATUTORY BACKGROUND

35. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into the navigable waters except in compliance with, among other things, a permit issued pursuant to sections 402 or 404 of the CWA, 33 U.S.C. § 1342, 1344.

36. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), authorizes the Administrator of EPA to require the owner or operator of any point source to provide such information as the Administrator may reasonably need to carry out the objectives of the CWA, including, among other things, the development and issuance of NPDES permits under section 402 of the CWA, 33 U.S.C. § 1342.

37. Under sections 308 and 402 of the CWA, 33 U.S.C. §§ 1318 and 1342, on November 16, 1990 the Administrator promulgated regulations relating to the control of storm water discharges, at 40 C.F.R. § 122.26.

38. Section 122.26(c)(1) of 40 C.F.R. provides that dischargers of storm water associated with industrial activity are required to apply for an individual permit, apply for a permit through a group application, or seek coverage under a general permit. Pursuant to 40 C.F.R. § 122.26(e), the deadline for individual and group permit applications was October 1, 1992. Pursuant to the NPDES Baseline General Permit available for dischargers of storm water associated with industrial activity located in New Hampshire (hereinafter the Baseline General Permit), dischargers seeking coverage under the Baseline General Permit were required to file a Notice of Intent (NOI) to be covered by October 1, 1992. 57 Fed. Reg. 41306 (September 9, 1992).

39. Under 40 C.F.R. § 122.26(b)(14)(iii), storm water associated with industrial activity includes storm water discharges associated with industrial activity from facilities identified under Standard Industrial Classifications (SIC) 10 through 14 (mineral industry), including active or inactive mining operations.

40. Effective September 29, 1995, EPA issued a final NPDES Storm Water Multi-Sector General Permit for Industrial Activities (60 Fed. Reg. 50804) (the "1995 Multi-Sector Permit"), available for certain facilities, including mineral mining processing facilities (Section J). To be covered under the 1995 Multi-Sector Permit, a facility discharging storm water associated with industrial activity was required to submit an NOI by March 29, 1996. 61 Fed. Reg. 5254 (February 9, 1996). For a facility previously covered by the Baseline General Permit,

an NOI had to be submitted prior to the expiration of the Baseline General Permit, or by September 25, 1997.

41. Effective October 20, 2000, EPA issued a final NPDES Storm Water Multi-Sector General Permit for Industrial Activities (65 Fed. Reg. 64746) (the "2000 Multi-Sector Permit"), available for certain facilities, including mineral mining and processing facilities (Sector J). To be covered under the 2000 Multi-Sector Permit, a facility discharging storm water associated with industrial activity after the effective date of the 2000 Multi-Sector Permit was required to submit an NOI two days prior to commencing operation of a facility. 65 Fed. Reg. 64810 (October 30, 2000). For a facility previously covered by the 1995 Multi-Sector General Permit, an NOI had to be submitted by January 29, 2001.

42. CWA section 404(a), 33 U.S.C. § 1344 (a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

43. CWA section 402(a), 33 U.S.C. § 1342 (a), authorizes the Administrator of EPA to issue permits for the discharge of pollutants into navigable waters in compliance with the requirements of the CWA, after notice and opportunity for public comment. Pursuant to Section 402(p)(2)(B) of the CWA, 33 U.S.C. § 1342(p)(2)(b), a storm water discharge associated with industrial activity must be permitted.

44. CWA section 502(5), 33 U.S.C. § 1362(5), defines "person" to include "an individual, corporation, partnership [or] association."

45. CWA section 502(12), 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to

include "any addition of any pollutant to navigable waters from any point source."

46. CWA section 502(6), 33 U.S.C. §1362(6), defines "pollutant" to include, among other things, dredged spoil, biological material, rock and sand.

47. CWA Section 502(14), 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance, . . . from which pollutants are or may be discharged."

48. CWA section 502(7), 33 U.S.C. §1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

49. 33 C.F.R. § 328.3(a)(1), (2), (5) and (7), and 40 C.F.R. § 232.2, define "waters of the United States" to include, among other things,: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

50. 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 define "wetlands" as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

51. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA section 301(a) or 308, 33 U.S.C. §§ 1311(a) or 1318.

52. CWA section 309(d), 33 U.S.C. § 1319(d), authorizes the commencement of an action for civil penalties against any person who violates CWA section 301(a) or 308, 33 U.S.C.

§§ 1311(a) or 1318.

Count 1: Failure to Apply for NPDES Storm Water Permit

53. The United States realleges and incorporates by reference the allegations of paragraphs 1 through 52 above as though fully set forth herein.

54. At all times relevant to this Complaint, activities associated with sand and gravel mining, as identified under Standard Industrial Code 14 within the meaning of 40 C.F.R. § 122(b)(14)(iii), occurred at the Facility. The sand and gravel mining operations at the Facility fall within the “industrial activities” covered by the NPDES Multi-Sector General Permits (“MSGPs”) issued by EPA in 1995 and 2000. Specifically, Sector J of the permit applies to activities covered by SIC code 1442 (“Construction Sand and Gravel Mining”).

55. From at least 2002 through at least 2005, the Defendants discharged “storm water associated with industrial activity,” within the meaning of 40 C.F.R. § 122.26, from point sources to the Little Cohas Tributary, which flows to the Merrimac River via the Little Cohas Brook, or to the Horse Trail Brook, which flows directly to the Merrimac River.

56. PSD #1, PSD #2, PSD #3, PSD #4, PSD #5 and PSD #6 are all “point sources” within the meaning of section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14).

57. The Horse Trail Brook, the Little Cohas Tributary, the Little Cohas Brook and the Merrimac River are navigable waters of the United States within the meaning of section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7).

58. The Defendants have not ever applied for an individual or group permit, nor did they submit an NOI for coverage under the 1995 Multi-Sector Permit, or the 2000 Multi-Sector Permit until August 23, 2005, when HSG submitted an NOI under the 2000 Multi-Sector Permit

for the Facility. On September 22, 2006 HSG also filed an NOI under EPA's NPDES General Permit for Storm Water Discharges from Construction Activities for the area surrounding PSD #6.

59. By failing to apply for a permit at the Facility, the Defendants continually violated section 308(a) of the CWA, 33 U.S.C. § 1318(a). Pursuant to sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), each Defendant is liable for a civil penalty of up to \$27,500 per day for each violation that occurred prior to March 15, 2004 and not to exceed \$32,500 per day for each violation which occurred on or after March 15, 2004.

Count 2: Unauthorized Discharges of Storm Water

60. The United States realleges and incorporates by reference the allegations of paragraphs 1 through 52 above as though fully set forth herein.

61. During certain storm events from at least 2002 through at least May 2005, at PSD #1 Defendants HSG, Ballinger and Five-N discharged "storm water associated with industrial activity" into waters of the United States from the Facility without a permit.

62. During certain storm events from at least 2002 through at least May 2004, at PSD # 2 Defendants HSG, Ballinger and Five-N discharged "storm water associated with industrial activity" into waters of the United States from the Facility without a permit.

63. During certain storm events from at least April 2003 through at least August 2003, at PSD #3 Defendants HSG, Ballinger and Five-N discharged "storm water associated with industrial activity" into waters of the United States from the Facility without a permit.

64. During certain storm events from at least May 2004 through at least May 2005, at PSD #4 Defendants HSG, Ballinger and Five-N discharged "storm water associated with

industrial activity” into waters of the United States from the Facility without a permit.

65. During certain storm events from at least May 2004 through at least May 2005, at PSD #5 Defendants HSG, Ballinger and Five-N discharged “storm water associated with industrial activity” into waters of the United States from the Facility without a permit.

66. During certain storm events at least on or about September 2002, at PSD # 6 Defendants HSG and TANA discharged “storm water associated with industrial activity” into waters of the United States from the Facility without a permit.

67. Each of the Defendants’ discharges of storm water associated with industrial activity from the Facility without a permit was a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

68. The discharges of storm water associated with industrial activity from the Facility are discharges of pollutants within the meaning of section 502(12) of the Clean Water Act, 33 U.S.C. § 1362(12).

69. Pursuant to sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, each Defendant is liable for a civil penalty of up to \$27,500 per day for each violation that occurred prior to March 15, 2004 and not to exceed \$32,500 per day for each violation which occurred on or after March 15, 2004.

Count 3: Failure to Respond to Section 308 Request

70. The United States realleges and incorporates by reference the allegations of paragraphs 1 through 52 above as though fully set forth herein.

71. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), authorizes the Administrator of

EPA to require the owner or operator of any point source to provide such information as the Administrator may reasonably need to carry out the objectives of the CWA.

72. EPA issued two information requests to HSG on January 22, 2003 and June 9, 2003.

73. HSG responded to these requests on February 14, 2003, February 18, 2003, June 25, 2003 and July 21, 2003.

74. The responses received from HSG are confusing, non-responsive and incomplete, and as such constitute failures to provide information required pursuant to Section 308(a) of the CWA, 33 U.S.C. § 1318 (a).

75. Pursuant to sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, HSG is liable for a civil penalty of up to \$27,500 per day for each violation that occurred prior to March 15, 2004.

Count 4: Discharge of Dredged and/or Filled Materials

76. The United States realleges and incorporates by reference the allegations of paragraphs 1 through 52 above as though fully set forth herein.

77. Beginning on or before May 26, 2005, Defendants HSG, Ballinger and Five-N discharged on numerous occasions dredged and/or fill material from point sources into waters of the United States without a permit under CWA Section 404.

78. The dredged and/or filled material that Defendants HSG, Ballinger and Five-N caused to be discharged, included among other things, dirt, rock and sand, which constitute “pollutants” as defined in CWA Section 502(6), 33 U.S.C. § 1362(6).

79. Upon information and belief, on each of these occasions Defendants HSG,

Ballinger and Five-N discharged pollutants by using earth moving equipment. This equipment constitutes "point sources" as defined in CWA Section 502(14), 33 U.S.C. § 1362 (14).

80. Defendants HSG, Ballinger and Five-N discharged pollutants into the Little Cohas Tributary, which flows into Little Cohas Brook, which flows into the Merrimac River, a navigable water which flows into the Atlantic Ocean.

81. The Little Cohas Tributary constitutes a "water of the United States" and "navigable waters" under CWA Section 502(7), 33 U.S.C. § 1362(7).

82. As described above in Paragraph 33, Defendants HSG, Ballinger and Five-N discharged pollutants into wetlands that formed the headwaters of the Little Cohas Tributary.

83. The wetlands referred to in Paragraph 82 are adjacent to the Tributary described in Paragraph 80.

84. The subject wetlands are "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions" within the meaning of 33 C.F.R. § 328.3(b) and 40 C.F.R. §§ 122.2 and 232.2 .

85. The subject wetlands constitute a "water of the United States" and "navigable waters" under CWA section 502(7), 33 U.S.C. § 1362(7).

86. Defendants HSG, Ballinger and Five-N did not obtain any permit from the Secretary of the Army, acting through the Chief of the Engineers, for the discharged of dredged and/or fill material into waters of the United States, as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a) and 1344.

87. Defendants HSG, Ballinger and Five-N have violated and continue to violate

CWA section 301(a), 33 U.S.C. § 1311(a), by their unauthorized discharges of dredged and/or fill material into waters of the United States.

88. Each day that such material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

89. Unless enjoined, Defendants are likely to continue to discharge dredged and/or fill material into, and/or to allow such material to remain in, waters of the United States in violation of CWA section 301(a), 33 U.S.C. § 1311(a).

90. Pursuant to sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, each Defendant is liable for a civil penalty not to exceed \$32,500 per day for each violation in which the District Court is authorized to assess civil penalties which occurred on or after March 15, 2004.

RELIEF SOUGHT

Wherefore, Plaintiff, the United States of America, respectfully requests that the Court grant the following relief:

1. Permanently enjoin Defendants HSG, Ballinger, Five-N, and TANA from discharging storm water from any point source not authorized by a NPDES permit or in violation of the terms of any NPDES permit;
2. Permanently enjoin Defendants HSG, Ballinger and Five-N from discharging or causing the discharge of dredged material, fill material, sediment, and any other pollutants into any waters of the United States except in compliance with the CWA;
3. Order the Defendants HSG, Ballinger and Five-N to undertake measures, at these Defendants' own expense and at the direction of EPA and/or the United States Army Corps of

Engineers, to effect complete restoration of waters of the United States, including wetlands, on the Facility and/or conduct off-site mitigation for irreversible environmental damage, as appropriate;

4. Order Defendants HSG, Ballinger, Five-N and TANA to comply with all applicable requirements of the Clean Water Act and its implementing regulations;
5. Order each Defendant to pay civil penalties not to exceed \$27,500 per day for each violation of the CWA that occurred prior to March 15, 2004 and not to exceed \$32,500 per day for each violation of the CWA which occurred on or after March 15, 2004;
6. Award the United States all costs and disbursements of this action; and
7. Grant such other relief as the Court deems just and proper.

For the United States of America,

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